U.S. Department of Labor Board of Alien Labor Certification Appeals
800 K Street, N.W.
Washington, D.C. 20001-8002

Date: October 24, 1997
Case No.: 96-INA-00024

In the Matter of:

DELTA TESTING LABORATORIES, INC.,
Employer

On Behalf Of:

GUERMAN VAINBLAT,
Alien

Appearance: Seymour Magier, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On October 19, 1993, Delta Testing Laboratories, Inc. ("Employer") filed an application for labor certification to enable Guerman Vainblat ("Alien") to fill the position of Steel, Field and Weld Inspector (AF 29-30). The job duties for the position are:

> Inspect steel welded and bolted structure. Inspect masonry, concrete, shear studs, decking, check all materials used for construction, perform checks, test control provision, prepare inspection reports. Make critical observations on compliance with design and safety standards, construction schedules--using construction inspection tools. Perform ultrasonic tests, using UT inspection equipment.

Further, the Employer requires three years of experience in the job offered or, in the alternative, three years of experience as an Engineer with Field Inspection duties. In addition, the Employer is requiring a "clean current driver's license."

The CO issued a Notice of Findings on April 7, 1995 (AF 98-102), proposing to deny certification on two grounds. First, the CO found that the Employer's requirement of three years of experience in the job offered is excessive. Likewise, the CO found the alternative experience requirement of three years of experience as an Engineer with Field Inspection duties to be unduly restrictive. Finally, the CO found that the Employer failed to establish that several U.S. applicants were rejected solely for lawful, job-related reasons.

Accordingly, the Employer was notified that it had until May 12, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated May 9, 1995 (AF 103-117), the Employer contended that the job offer should be classified as a Weld Inspector, not a construction inspector as the CO stated. As such, the Employer noted that the SVP is 7 and, therefore, the experience requirement in the job offered is not unduly restrictive. The Employer also argued that any requirement that is expressed as an alternative job requirement only serves to expand the pool of potential U.S. workers and can never be considered unduly restrictive, as long as it is related to the job offered. Finally, the Employer stated that the three U.S. applicants named in the NOF were either unqualified or unavailable for the position. Specifically, the Employer asserted that one applicant indicated that the salary offered was too low and the other two individuals lacked specific experience inspecting steel welded and bolted structures.

The CO issued the Final Determination on May 26, 1995 (AF 118-120), denying certification because the Employer failed to establish that it rejected two U.S. applicants for lawful, job-related reasons.

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

On June 29, 1995, the Employer requested review of the Denial of Labor Certification (AF 121-141). The CO denied reconsideration on August 15, 1995 (AF 142), and on October 3, 1995, forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

Section 656.20(c)(8) provides that the job opportunity must have been open to any qualified U.S. worker. As such, employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. *H.C. LaMarche Ent., Inc.*, 87-INA-607 (Oct. 27, 1988). Further, § 656.21(b)(6) (now recodified as § 656.21(b)(5)) provides that an employer must show that U.S. applicants were rejected solely for lawful, job-related reasons. Therefore, actions by the employer which indicate a lack of good-faith effort, or actions which prevent qualified U.S. workers from further pursuing their applications, are a basis for denying certification. In such circumstances, the employer has not proven that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work as required by § 656.1.

The issue in the instant case is whether the Employer rejected two potentially qualified U.S. applicants for lawful, job-related reasons. In his recruitment report, the Employer stated that Mr. Matute was interviewed and subsequently rejected for lack of experience with steel welded and bolted structures (AF 61). Moreover, the Employer stated, "as a result of his lack of experience in the job offered and in the job duties, we determined that Mr. Matute was not qualified for the position." Likewise, in rebuttal, the Employer stated that the applicant is not qualified for the job because he lacks experience in inspection of steel welded and bolted structures which is "the most important job duty" (AF 111). The Employer further stated that:

> It is not conceivable that an individual without such experience could qualify for the job. An engineer, no matter how educated and no matter how much experience he might have in any number of fields of engineering would not be qualified for this job if he didn't have three years of experience in inspection of steel welded and bolted structures.

(AF 110).

Mr. Matute's resume indicates that he has seven years of experience as an engineer and 10 months of experience as a construction supervisor (AF 55). Specifically, Mr. Matute was a construction engineer for an industrial plant, a shopping mall, and duplex housing units. Similarly, he worked as the Head Engineer for the construction/inspection of civil work which included public buildings, bridges, sport fields, and box culverts. Furthermore, in response to a questionnaire sent by the New York Department of Labor, Mr. Matute stated that he considered himself qualified for the job opportunity (AF 86).

We find several problems with the Employer's rejection of Mr. Matute. First, the Employer's alternative experience requirement is three years of experience as an Engineer with Field Inspection duties (AF 30). However, the Employer stated in rebuttal that:

> [a]n engineer, no matter how educated and no matter how much experience he might have in any number of fields of engineering would not be qualified for this job if he didn't have three years of experience in inspection of steel welded and bolted structures.

(AF 110). This statement nullifies the Employer's alternative experience requirement as it is quite possible that an individual, such as Mr. Matute, qualifying for the job opportunity under the alternative experience requirement, would not have specific experience inspecting steel welded and bolted structures. An employer cannot reject U.S. workers for lack of experience in each duty listed where it required experience in the job offered or, in the alternative, experience in a more generalized field. *Total Building Maintenance, Inc.*, 90-INA-473 (Apr. 12, 1993). Moreover, we find that the Employer's conclusory statement that the applicant does not have experience inspecting steel welded and bolted structures is insufficient to establish that Mr. Matute is not qualified for the job, as his resume indicates that he has experience as the Head Engineer for the construction/inspection of civil work which included public buildings, bridges, sport fields, and box culverts (AF 55). A Panel of the Board has held that employers must produce objective and detailed reasons for rejecting an applicant who meets the stated minimum requirements for the position. *Orient Computer Corp.*, 91-INA-322 (March 18, 1994). The Employer in this case has failed to produce objective and detailed reasons for rejecting the U.S. applicant.

Therefore, we find that the Employer has not met its burden of establishing that it rejected all U.S. applicants for lawful, job-related reasons. Based on the foregoing, we find it unnecessary to discuss the Employer's rejection of other U.S. applicants. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

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RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.